Repairing America’s Core Democratic Institutions: The Judiciary and Democracy

Prof. DAVID PERITZ

The Problem of the Chicken and the Egg

1. Distinguishing Problems with Democracy Itself (Intra-institutional) from Social Problems that Create Institutional Problems (Extra-institutional)
2. The Complex Interaction and Mutual Reinforcement Between Intra- and Extra-Institutional Problems
3. Does 2020 Present an Opportunity to Undertake Institutional Reform?
   a. Multiple Intersecting Crises and the Openings this Might Generate
   b. The Week that the Myth of Donald Trump Collapsed—and the Role of the Republican Party Played in Sustaining this Myth
4. Can a Single Political Party be a Vehicle for Reform that Transcends its Narrow Partisan Interests?

Are We Witnessing a More General Erosion of Support for Democracy in the US in the 21st Century?

Trump’s Authoritarian Score Card (1-7 Scale)

<table>
<thead>
<tr>
<th>1. Rejection of core democratic commitment to the rule of the law</th>
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<tbody>
<tr>
<td>a. 4</td>
</tr>
<tr>
<td>b. 5</td>
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<tr>
<td>c. 1</td>
</tr>
<tr>
<td>d. 6</td>
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<table>
<thead>
<tr>
<th>2. Deter or Suppress of critical civil liberties and movements</th>
</tr>
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<tbody>
<tr>
<td>a. 5</td>
</tr>
<tr>
<td>b. 7</td>
</tr>
<tr>
<td>c. 6</td>
</tr>
<tr>
<td>d. 1</td>
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<tr>
<th>3. Suppression of Independent media and creation of state media</th>
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</thead>
<tbody>
<tr>
<td>a. 4</td>
</tr>
<tr>
<td>b. 5</td>
</tr>
<tr>
<td>c. 7</td>
</tr>
<tr>
<td>d. 7</td>
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<table>
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<tr>
<th>4. Revival of certain civil liberties and movements, including regional/ local</th>
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<tbody>
<tr>
<td>a. 3</td>
</tr>
<tr>
<td>b. 5</td>
</tr>
<tr>
<td>c. 6</td>
</tr>
<tr>
<td>d. 1 (my entirely non-scientific calculations)</td>
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</table>

1. 4: All measures of the above are excluded from the state media. They are considered to be independent media, both in terms of ownership and in terms of programming. 2. 5: The state media are at least partially independent of the state, as they are owned by independent entities or are funded by independent sources. 3. 7: The state media are controlled by the state, as they are owned by state entities or are funded by state sources. 4. 7: The state has taken steps to suppress or revive certain civil liberties, including regional/local ones, to the extent that they are considered to be limitations on the state's authority.
Declining Value of Living in a Democracy in US

![Graph showing declining importance of living in a democracy by decade of birth.]

(Yascha Mounk, The People Against Democracy, p. 105)

Declining Participation as Measured by Voter Turnout

![Graph showing declining voter turnout over time.]

(Yascha Mounk, The People Against Democracy, p. 108)

Declining Interest in Politics for Younger Americans

![Graph showing declining interest in politics by decade of birth.]

(Yascha Mounk, The People Against Democracy, p. 101)

Increasing Support for Nondemocratic Rule

![Graph showing increasing support for nondemocratic rule over time.]

(Yascha Mounk, The People Against Democracy, p. 100)
Recent Evidence of a Specific Syndrome Behind Recent Erosion of Republican Support for Democracy and Growing Tolerance for Political Violence (Larry Bartels)

Larry M. Bartels, "Ethnic Antagonism Erodes Republican Commitment to Democracy," Proceedings of the National Academy of Sciences, 117: 10, 2020

Ethnic Antagonism and Antidemocratic Attitudes

What’s Driving Parties to the Right?
A little Help from Social Theory (Durkheim in Particular)
A Two Dimensional View of Partisan Competition

Bartels’ In His Own Words
On the Significance of His Findings

Growing partisan polarization and democratic “backsliding” in various parts of the world have raised concerns about the attachment of ordinary Americans to democratic institutions and procedures. I find that substantial numbers of Republicans endorse statements contemplating violations of key democratic norms, including respect for the law and for the outcomes of elections and eschewing the use of force in pursuit of political ends. The strongest predictor by far of these antodemocratic attitudes is ethnic antagonism—especially concerns about the political power and claims on government resources of immigrants, African-Americans, and Latinos. The strong tendency of ethnocentric Republicans to countenance violence and lawlessness, even prospectively and hypothetically, underlines the significance of ethnic conflict in contemporary US politics.
Growing Partisan Polarization in Congress

Things Are Different But Similar in the US

Polarization is No Longer Just an Elite Affair
All Parties Have Moved to the Right

From Asymmetrical to More Symmetrical Polarization in the US?

A Perfect Storm for American Democracy
1. Rapid and Disintegrative Cultural Change
2. Rapid and Dislocating Economic Change
3. Rapid and Disruptive Technological Change
4. Rapid Demographic Change
5. Decline in Bottom-up Organization & Mobilization
6. Elite Capture and Unresponsiveness in Democratic Institutions

And the Need to Examine The Institutional Roots of Our Deformed Democracy

Drilling Down on the Senate and American Democracy: Is the Senate Becoming the Anchor of Minoritarian Rule?
The Skewed Relationship Between the Popular Vote And Electoral College Outcomes: In 2020 Democrats Need Popular Landslide to Be Secure of Electoral College Victory

- 0-1 points: just 6%
- 1-2 points: 22%
- 2-3 points: 40%
- 3-4 points: 76%
- 4-5 points: 89%
- 5-6 points: 98%
- 6+ points: 99%

The Electoral College’s Double Distortion: Over-represents Less Populous States and Fractures Popular Vote by Peculiar Geographic Containers

Visualizing Distorted Democracy

The Senate is Much Worse than The Electoral College

The Political-Geographic Composition of America versus that of the Senate

Political Geography of the Contemporary U.S.  
Political Geography of Representation in the Senate

Understanding the Senate’s Skew And Its Consequences

Translating this Skew into Electoral Math

Beginning to Think About How to Repair Democracy’s Structural Distortion

<table>
<thead>
<tr>
<th>Election (Tipping point state or district in parentheses)</th>
<th>Dem Two Way Vote Share in 2016</th>
<th>Geographical Penalty</th>
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</thead>
<tbody>
<tr>
<td>National</td>
<td>51.1%</td>
<td>NA</td>
</tr>
<tr>
<td>Electoral College (PA)</td>
<td>49.6%</td>
<td>-1.5%</td>
</tr>
<tr>
<td>House (NE-02)</td>
<td>48.8%</td>
<td>-2.3%</td>
</tr>
<tr>
<td>Senate (NC)</td>
<td>48.1%</td>
<td>-3.0%</td>
</tr>
</tbody>
</table>
The Implications for the Supreme Court

The Supreme Court

Ginsburg’s replacement could be the third biggest shift on the court

One of the Most Momentous Ideological Shifts for the Court in Living Memory

Big shifts in the court’s make-up are rare

Supreme Court justice replacements by the biggest changes in ideological rank, where 1 is most liberal and 9 is most conservative

But Not an Anomaly

Part of a Gradual Transformation of the Federal Judiciary as a Whole
Some Thoughts on the Role the Supreme Court Does and Can Play in American Democracy

Avoiding a Narrowly Results-Based Approach to the Constitution and Judicial Politics

I. Results-Based Approach Leads to a Court that Appears Purely Partisan
II. Especially Now, We Need a Court that is not Apolitical but that Transcends the Partisan Fray: Widely Accepted Arbiters to Protects the Rules of the Game and Preserve Popular Sovereignty, Civil Rights and Political Progress
III. Lessons Learned From the Conservative Faustian Bargain: Embracing a Court that Invalidates Democratic Equality for the Sake of Rolling Back Rights that Destabilize Tradition and Hierarchy (Adam Cohen)

Making the Case for a Democratic Understanding of Constitutional Preservation and Innovation (and not just against Judge Barrett)

I. An Alternative Approach to Judicial Review within Democratic Constitutionalism: The Justices as the People’s Principals in Protecting Popular Sovereignty and Its Highest Order Law from Transient Majorities and Vested Interest (Frank Michelman)
II. Understanding Constitutional Interpretation and Innovation as the Essence of Popular Sovereignty and Institutionally and Politically Dispersed (Larry Kramer)
III. Intermittent Constituent Moments in which the People Resume the Politics of Making and Extending the Constitution and with It Themselves and Our Rights (Bruce Ackerman, Jason Frank)
IV. The Difficult Work of the Supreme Court Justice within this Framework: Distinguishing Moments when Congress Does the work of Legislating the People’s Constitutional Innovations or Making Ordinary Law Within this Framework from Times when Transient Majorities and Vested Interest Violate Higher Popular Law